Instead, the Republican majority has apparently decided to devote the July work period to partisan political matters. We are reading press accounts about Republicans maneuvering to bring the divisive constitutional amendment to federalize marriage to this floor for debate. The Senate Judiciary Committee has held a few hearings on this issue but has yet to consider language of a proposed constitutional amendment. Bypassing the committee of jurisdiction to bring this or any constitutional amendment to the Senate floor is an unmistakable sign that political expediency and haste, in the furtherance of political expediency, are the guiding principles for the Republican majority in scheduling the Senate's time. Political expediency—whatever it takes—is their guidepost, not the pressing needs of the country to act on a budget or on the annual appropriations bills. Paramount to Republican leaders at the moment are such matters as the divisive, hot-button topic of federalizing marriage law, by constitutional amendment. Republican partisans seem intent on politicizing not only judicial nominations but also the Constitution itself during this election cycle.

Democrats fulfilled our commitment to the White House when we considered the 25th judicial nomination that was part of our arrangement this year. I read that Republicans will now insist on devoting a good portion of the Senate's remaining time to the most divisive and contentious of the President's judicial nominees. They are intent on following the advice of the Washington Times editorial page to, they believe, make Democrats look bad, when in fact it is the President who is seeking to make judicial confirmations a partisan political issue. Democrats have cooperated in confirming almost 200 judges already. That is more than the total confirmed in President Clinton's last term, the President's father's presidency or in President Reagan's first term. Federal judicial vacancies have been reduced to their lowest level in decades.

It is wrong and it is corrosive to seek partisan advantage at the expense of the independent Federal judiciary or our national charter, the Constitution. I wonder in Presidential election years whether we should not have a corollary to the ''Thurmond Rule'' on judicial nominations that we could call the ''Durbin Rule.'' The astute Senator from Illinois recently observed that we should prohibit consideration of constitutional amendments within 6 months of a Presidential election. He is right in pointing out that the Constitution is too important to be made a bulletin board for campaign sloganeering. We should find a way to restrain the impulse of some to politicize the Constitution.

This week the Republican leadership has stalled action for days on any legislation as it resists amendments to the class action legislation from both Democratic and Republican Senators. The Republican leadership's handling of this bill is a prescription for nonaction, not for legislative movement forward.

Just yesterday Roll Call published an insightful editorial lamenting what it called the ''Big Mess Ahead.'' I think we may already be stuck in that big mess. The editorial noted that ''July should be appropriations month in the Senate.'' I agree. This traditionally has been when we were focused on getting our work done and making sure the funding for the various functions of the Federal Government were appropriated by the Congress, in fulfilling Congress's responsibilities and its power of the purse. Not this year.

Roll Call observes that ''the second session of the 108th Congress is poised to accomplish nothing.'' The way things are going, under Republican leadership, this session will make the ''do-nothing'' Congress against which President Harry Truman ran seem like a legislative juggernaut by comparison.

I ask unanimous consent that the July 7, 2004, Roll Call editorial be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Roll Call, July 7, 2004]

BIG MESS AHEAD

Here we go again. The Senate can't pass a budget resolution. Only one of the 13 appropriations bills has cleared both the House and Senate, July is a short legislative month, and everyone will be gone in August. You know what this means: a lame-duck session in November and a messy, pork-riddled omnibus spending bill.

And it's not just on the money front that the second session of the 108th Congress is poised to accomplish nothing. The House and Senate can't agree on an energy bill despite high gasoline prices, last year's Northeast blackout, repeated urging from the White House and constant reminders of America's over-dependence on risky Mideast oil. Bankruptcy-reform legislation is stymied. So is welfare-reform reauthorization. Maybe there will be a Transportation reauthorization bill, maybe not. Even the Defense reauthorization bill faces a tough conference.

Sure, the House and Senate have done a few must-do things. The United States is in a war, so both chambers have passed a Defense appropriations bill. And both have approved legislation repealing a $5 billion-a-year export subsidy after the World Trade Organization ruled against it and authorized imposition of punitive tariffs against U.S. products. Despite complaints from both parties about expanding budget deficits, however, the House's repeal measure contained $15 billion in new corporate tax breaks; the Senate added $17 billion.

As any House Member will tell you, the perennial locus of delay in Congress is ''The Other Body.'' And so it is this year. The House has passed four appropriations bills, and three more have cleared committee. In the Senate, it's one and one. July should be appropriations month in the Senate, but instead Majority Leader Bill Frist (R-Tenn.) has scheduled class-action tort reform—which had the 60 votes necessary for passage last November—and an anti-gay-marriage constitutional amendment designed mainly to embarrass Democrats before their national convention.

Republicans blame Democrats for Senate ''obstructionism,'' but the failure to pass a budget resolution—which would have made it easier to pass appropriations bills—is mainly an intra-GOP affair. Moderates want to impose a pay-as-you-go system to restrain spending. Conservatives, ironically enough, don't. The situation has the conservative Senate leadership so exercised that it's trying to acquire the means to threaten wayward moderates with the loss of committee chairmanships.

It's true that if Senate Republicans drop the seniority system and give leaders the power to make committee assignments and choose chairmen, they simply will be following the authoritarian patter of Senate Democrats and of both parties in the House. Still, the effect would be to smother centrism—what there is left of it—and enhance partisanship and polarization. That's a distinct Congressional pattern: When things are going badly, make them worse.

INTERROGATION AND TREATMENT OF FOREIGN PRISONERS

Mr. LEAHY. Mr. President, a number of us remain concerned about the abuse of foreign prisoners, and about the guidance provided by the President's lawyers with regard to torture. Much has happened since June 17, 2004, when the Judiciary Committee defeated, on a party-line vote, a subpoena resolution for documents relating to the interrogation and treatment of detainees and June 23, when the Senate defeated an amendment to the Defense Authorization bill on a party-line vote that would have called upon the Attorney General to produce relevant documents to the Senate Judiciary Committee. Because of continued stonewalling by the administration, we remain largely in the dark.

Several Republican Senators have indicated that we should give the administration more time to respond to inquiries, although some of us had been asking for information for more than a year. The Republican administration continues its refusal to provide the documents that have been requested and refused even to provide an index of the documents being withheld.

The Department of Justice admitted in the July 1 letter that it had ''given specific advice concerning specific interrogation practices,'' but would not disclose such advice to members of this committee, who are duly elected representatives of the people of the United States, as well as members of the committee of oversight for the Department of Justice. USA Today reported on June 28, 2004, that the Justice Department issued a memo in August 2002 that ''specifically authorized the CIA to use 'waterboarding,'' an interrogation technique that is designed to make a prisoner believe he is suffocating. This memo is reportedly classified and has not been released. According to USA Today: ''Initially, the Office of Legal Counsel was assigned the task of approving specific interrogation techniques, but high-ranking Justice Department officials intercepted the CIA request, and the matter was

handled by top officials in the deputy attorney general's office and Justice's criminal division.''

So while former administration officials grant press interviews and write opinion articles denying wrongdoing; while the White House and Justice Department hold closed briefings for the media to disavow the reasoning of this previously relied upon memoranda and to characterize what happened; Senators of the United States are denied basic information and access to the facts. The significance of such unilateralism and arrogance shown to the Congress and to its oversight committees cannot continue.

I have long said that somewhere in the upper reaches of this administration a process was set in motion that rolled forward until it produced this scandal. To put this scandal behind us, first we need to understand what happened. We cannot get to the bottom of this until there is a clear picture of what happened at the top. It is the responsibility of the Senate, including the Judiciary Committee, to investigate the facts, from genesis to final approval to implementation and abuse. The documents must be subject to public scrutiny, and we will continue to demand their release.

There is ample evidence that American officials, both military and CIA, have used extremely harsh interrogation techniques overseas, and that many prisoners have died in our custody. Administration officials admit that 37 foreign prisoners have died in captivity, and several of these cases are under investigation, some as homicides. On June 17, David Passaro, a CIA contractor, was indicted for assault for beating an Afghan detainee with a large flashlight. The prisoner, who had surrendered at the gates of a U.S. military base in Afghanistan, died in custody on June 21, 2003, just days before I received a letter from the Bush administration saying that our Government was in full compliance with the Torture Convention.

Some individuals who committed abusive acts are being punished, as they must be. But what of those who gave the orders, set the tone or looked the other way? What of the White House and Pentagon lawyers who tried to justify the use of torture in their legal arguments? The White House has now disavowed the analysis contained in the August 1, 2002, memo signed by Jay Bybee, then head of the Office of Legal Counsel. That memo, which was sent to the White House Counsel, argued that for acts to rise to the level of torture, they must go on for months or even years, or be so severe as to generate the type of pain that would result from organ failure or even death. The White House and DOJ now call that memo ''irrelevant'' and ''unnecessary'' and say that DOJ will spend weeks rewriting its analysis.

As we all know, on June 22, 2004, the White House released a few hundreds of pages of documents—a self-serving and highly selective subset of materials. The documents that were released raised more questions than they answered. Now, more than two weeks later, none of those issues have been resolved.

For example, the White House released a January 2002 memo signed by President Bush calling for the humane treatment of detainees. Did the President sign any orders or directives after January 2002? Did he sign any with regard to prisoners in Iraq?

Why did Secretary Rumsfeld issue and later rescind tough interrogation techniques? And how did these interrogation techniques come to be used in Iraq, where the administration maintains that it has followed the Geneva Conventions?

Where is the remaining 95 percent of material requested by members of the Senate Judiciary Committee? Why is the White House withholding relevant documents dated after April 2003?

I was gratified that the Senate on June 23 passed an amendment that I offered to the Defense authorization bill that will clarify U.S. policy with regard to the treatment of prisoners and increase transparency. But the stonewalling continues: The Pentagon opposes this amendment. I am hopeful that we will prevail in keeping this provision in the bill. Five Republican Senators supported the amendment against an attempt to table it. I thank each of them. I also want to commend the Senate for adopting, also as part of the Defense authorization bill, the Durbin amendment against torture, and I want to acknowledge an important step taken in the House on the same day. The House Appropriations Committee added language to the 2005 Justice Department spending bill that would prohibit any department official or contractor from providing legal advice that could support or justify use of torture.

As it completed its term, the Supreme Court issued its decisions in highly significant cases involving the legal status of so-called enemy combatants. The Court reaffirmed the judiciary's role as a check and a balance, as the Constitution intends, on power grabs by the executive branch. The Court ruled that the Bush administration's assertion that the President can hold suspects incommunicado, indefinitely and without charge, is as arrogant as are its legal arguments that the President can authorize torture. No President is above the law or the Constitution. The Court properly rejected the administration's plea to 'just trust us' and repudiated its assertion of unchecked power.

This Senate and in particular the Judiciary Committee continues to fall short in its oversight responsibilities. President Bush has said he wants the whole truth, but he and his administration instead have circled the wagons to forestall adequate oversight. The President must order all relevant agencies to release the memos from which these policies were devised. There needs to be a thorough, independent investigation of the actions of those involved, from the people who committed abuses, to the officials who set these policies in motion. Only when these actions are taken will we begin to heal the damage that has been done.

We need to get to the bottom of this scandal if we are to play our proper role in improving security for all Americans, both here at home and around the world.

THREAT TO ONLINE PRIVACY

Mr. LEAHY. Mr. President, I want to address a recent court decision that has exposed America's e-mails to snooping and invasive practices. The 2-to-1 decision by the First Circuit Court of Appeals in a case called United States v. Councilman has dealt a serious blow to online privacy. The majority—both, Republican-appointed judges—effectively concluded that it was permissible for an Internet Service Provider to comb through its customers' emails for corporate gain. If allowed to stand, this decision threatens to eviscerate Congress's careful efforts to ensure that privacy is protected in the modern information age.

The indictment in Councilman charged the defendant ISP with violating the Federal Wiretap Act by systematically intercepting, copying, and then reading its customers' incoming emails to learn about its competitors and gain a commercial advantage. This is precisely the type of behavior that Congress wanted to prohibit when it updated the Wiretap Act in 1986, as part of the Electronic Communications Privacy Act (ECPA), to prohibit unauthorized interceptions of electronic communications. Congress's goal was to ensure that Americans enjoyed the same amount of privacy in their online communications as they did in the offline world. Just as eavesdroppers were not allowed to tap phones or plant ''bugs'' in order to listen in on our private conversations, we wanted to ensure that unauthorized eyes were not peering indiscriminately into our electronic communications.

ECPA was a careful, bipartisan and long-planned effort to protect electronic communications in two forms—from real-time monitoring or interception as they were being delivered, and from searches when they were stored in record systems. We recognized these as different functions and set rules for each based on the relevant privacy expectations and threats to privacy implicated by the different forms of surveillance.

The Councilman decision turned this distinction on its head. Functionally, the ISP in this case was intercepting emails as they were being delivered, yet the majority ruled that the relevant rules were those pertaining to stored communications, which do not apply to ISPs. The majority rejected the Government's argument that an